IN THE UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

LEROY D. SMITH,	)	
	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NO. 6:04cv00034**
	)	
JO ANNE B. BARNHART,	)	
Commissioner Of Social Security,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Plaintiff Leroy D. Smith ("Smith") brings this action pursuant to the Social Security Act § 205(g), 42 U.S.C. § 405(g), to obtain judicial review of a final decision of the Commissioner of Social Security denying his claim for Disability Insurance Benefits ("DIB") under Title II of the Social Security Act, 42 U.S.C. §§ 401-433, and for Supplementary Security Income ("SSI") under Title XVI of the Act, 42 U.S.C. §§ 1381-1383f. Plaintiff worked until 1999, but bases his claim, that he filed in 2001, on injuries he sustained in a serious auto accident in 1981. This case was referred to the undersigned Magistrate Judge on November 17, 2004, for a Report and Recommendation. After briefing and oral argument on the appeal, and based on a thorough review of the administrative record and relevant case law, it is recommended that both the Commissioner's and Smith's motions for summary judgment be denied and the case be reversed and remanded for further administrative proceedings pursuant to Sterling Smokeless Coal Co. v. Akers, 131 F.3d 438, 439-40 (4th Cir. 1997).

The decision of the Commissioner does not analyze all of the evidence and does not specifically explain the weight given to obviously probative exhibits. In particular, the Administrative Law Judge

("ALJ") failed to evaluate plaintiff's grade school Intelligence Quotient ("I.Q.") scores, or adaptive behavior before age 22. Additionally, the ALJ did not give sufficient attention to whether Smith's injuries impose a significant work-related limitation. See Craig v. Chater, 76 F.3d 585, 596 n.7 (4th Cir. 1996); Cauthen v. Finch, 426 F.2d 891, 892 (4th Cir. 1970). Given these shortfalls, there is no way for the Court to determine whether the ALJ's decision is supported by substantial evidence.

ADMINISTRATIVE PROCEEDINGS

Plaintiff applied for DIB and SSI on August 10, 2001, alleging disability as of December 31, 1999, based on back and neck pain and headaches that are the result of 1981 car crash. (Record ("R.") at 93-95) The application was denied initially, and on reconsideration by the Social Security Administration ("SSA"). (R. 22) Plaintiff requested a hearing which was conducted on December 10, 2002, at which time he testified before an ALJ. (R. 22) On February 26, 2003, the ALJ found that Plaintiff was not entitled to a period of disability, DIB, or SSI payments under sections 216(i), 223, 1602, and 1614(a)(3)(A) respectively of the Social Security Act. (R. 32) These findings became the final decision of the Commissioner of Social Security on June 25, 2004 when the Appeals Council denied Plaintiff's request for review. (R. 8)

The only issue before the Court is whether the Commissioner's decision that the Plaintiff failed to meet the mental retardation listings is supported by substantial evidence.

APPLICABLE LAW AND REGULATIONS

The Social Security Act provides that disability benefits shall be available to those persons insured for benefits, who are not of retirement age, who properly apply, and who are "under a disability." 42 U.S.C. § 423(a). Disability is defined in 42 U.S.C. § 423(d)(1)(A) as:

> [T]he inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for at least 12 continuous months.

To facilitate a uniform and efficient processing of disability claims, the Social Security Act has by regulation reduced the statutory definition of "disability" to a series of five sequential questions. An examiner must determine whether the claimant (1) is engaged in substantial gainful activity, (2) has a severe impairment, (3) has an impairment which equals an impairment contained in the Social Security Act listings of impairments, (4) has an impairment which prevents past relevant work, and (5) has an impairment which prevents him from doing any other work. 20 C.F.R. § 404.1520.

The scope of judicial review by the federal courts in disability cases is narrowly tailored to determine whether the findings of the Commissioner are supported by substantial evidence and whether the correct law was applied. Richardson v. Perales, 402 U.S. 389 (1971); Hays v. Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1990). Consequently, the Act precludes a de novo review of the evidence and requires the court to uphold the Secretary's decision as long as it is supported by substantial evidence. See Pyles v. Bowen, 849 F.2d 846, 848 (4th Cir. 1988) (citing Smith v. Schweiker, 795 F.2d 343, 345 (4th Cir. 1986)). The phrase "substantial evidence" is defined as:

> [E]vidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla

> of evidence but may be somewhat less than a preponderance. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is "substantial evidence."

Shively v. Heckler, 739 F.2d 987, 989 (4th Cir. 1984) (quoting Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966)).

Thus, it is the duty of this court to give careful scrutiny to the whole record to assure that there is a sound foundation for the Commissioner's findings and that her conclusion is rational. Thomas v. Celebrezze, 331 F.2d 541, 543 (4th Cir. 1964). If there is substantial evidence to support the decision of the Commissioner, that decision must be affirmed. Blalock v. Richardson, 483 F.2d 773, 775 (4th Cir. 1972).

FACTS

Smith was born on January 25, 1953 and attended school to the seventh grade. (R. 152) Smith was retained in the first and second grades, and unsuccessfully pursued the seventh grade twice. (R. 211) He left school at 17 to work. (R. 211) Since then, he has worked as a machine operator in the milling industry, a loader operator in the timber industry, a cleaning crew supervisor, a cook, a dishwasher, and a vinyl packer. (R. 107, 162, 183, and 415-17) No evidence exists that he has engaged in substantial gainful activity since the alleged onset of his disability. (R. 23)

Smith claimed in his application for social security benefits that he cannot work because of pain in his back and neck and headaches. He claims that these symptoms have persisted since he was injured in an automobile accident in 1981. (R. 24) Smith also has limited intelligence. In I.Q. tests administered at various times since childhood, he has consistently scored somewhere between the mid 60's to low 80's. (R.211, 214, 217, 231, 257) Although he did not claim mental retardation in his

application for SSA benefits, he relies on this issue as his sole basis for this appeal. Additionally, Smith has an extensive history of alcohol abuse that may compound the impairments of which he complains. (R. 25-26, 28-29)

ANALYSIS

The Commissioner uses a five-step process in evaluating DIB claims. See 20 C.F.R. § 404.1520 (2003). See also Heckler v. Campbell, 461 U.S. 458, 460-62 (1983); Hall v. Harris, 658 F.2d 260, 264-65 (4th Cir. 1981). This process requires the Commissioner to consider, in order, whether a claimant (1) is working; (2) has a severe impairment; (3) has an impairment that meets or equals the requirements of a listed impairment; (4) can return to his past relevant work; and (5) if not, whether he can perform other work. See 20 C.F.R. § 404.1520 (2003). If the Commissioner finds conclusively that a claimant is or is not disabled at any point in this process, review does not proceed to the next step. See 20 C.F.R. § 404.1520(a) (2003).

Under this analysis, a claimant has the burden of showing that he is unable to return to his past relevant work because of his impairments. Once the claimant establishes a prima facie case of disability, the burden shifts to the Commissioner. To satisfy this burden, the Commissioner must then establish that the claimant has the residual functional capacity, considering the claimant's age, education, work experience and impairments, to perform alternative jobs that exist in the national economy. See 42 U.S.C.A. § 423(d)(2); McLain v. Schweiker, 715 F.2d 866, 868-69 (4th Cir. 1983); Hall, 658 F.2d at 264-65; Wilson v. Califano, 617 F.2d 1050, 1053 (4th Cir. 1980).

Employing this analytical framework, the ALJ found Smith not to be disabled. Under the first step, he found that Smith had not engaged in substantial gainful work since the alleged onset date. (R.

23) He also found that Smith met the second step because he has an impairment or combination of impairments considered "severe." (R. 31) The ALJ, however, found that Smith's medically determinable impairments did not meet or medically equal one of the listed impairments in 20 C.F.R. pt. 404, subpt. P, app. 1. (R. 31) Although the ALJ found that Smith could not perform any of his prior relevant work because of his impairments, he did find that Smith retained the residual functional capacity to perform a significant range of light work.[1] (R. 31-32) Finally, the ALJ determined Smith could make a successful adjustment to work that exists in significant numbers in the national economy.[2] Based on these findings, the ALJ concluded that Smith was not under a "disability" at any time through the date of the decision. (R. 21)

Smith challenges the ALJ's finding that he does not meet the mental retardation listings in 20 C.F.R. pt. 404, subpt. P, app. 1, §12.05C. Section 12.05C provides that a claimant meets the required level of severity for mental retardation when he has: (1) a valid verbal, performance, or full scale I.Q. of 60 to 70; and (2) a physical or other mental impairment imposing an additional and significant work-related limitation or function. Additionally, the introductory paragraph of section 12.05 provides: "Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e. the evidence

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[1]The ALJ limited Smith's range of light work because he found that Claimant "cannot climb and should avoid exposure to hazards such as heights and moving machinery." (R. 29) Further, the ALJ found Smith has "a limited ability to carry out detailed instructions, but can do simple, repetitive tasks in a low stress environment with minimal interaction with people." (R. 29)

[2]Examples of such jobs include work as an assembler (with 7,800 positions in the region); food preparer (with 6,000 positions in the region); cleaner (with 11,000 positions in the region); and hand packer (with 4,400 positions in the region). (R. 30)

demonstrates or supports onset of the impairment before age 22." *Id.* This capsule definition is an additional element to Listing 12.05C. Barnes v. Barnhart, 2004 WL 2681465, *4 (10th Cir. 2004). The capsule definition makes it clear that mental retardation is a life-long, and not acquired, disability. Thus, to qualify as disabled under this listing, a plaintiff must first demonstrate that he has had deficits in adaptive functioning that began during childhood.

Smith argues that the ALJ's decision is not based on substantial evidence because it incorrectly relies on one higher I.Q. test result to the exclusion of others.[3] The undersigned agrees with the plaintiff's conclusion, but not the reasoning. The decision is not based on substantial evidence because the ALJ failed to consider whether Smith has been mentally retarded from childhood. There is no indication that the ALJ considered the issue of the impact of his mental state on his adaptive behavior before age 22.[4]

The ALJ fails to evaluate whether Smith's grade-school I.Q. score in the 60s and poor academic performance demonstrates deficits in adaptive functioning initially manifested during childhood. The ALJ focused instead on post-car-accident I.Q. tests. The undersigned recommends that the case be remanded to determine whether Smith has subaverage general intellectual functioning with deficits in adaptive functioning that initially manifested during his developmental period, including consideration of the school age IQ values.

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[3]The express language of listing 12.05C suggests that picking and choosing between I.Q. scores is not appropriate. Rather, the issue is whether Smith had "a valid" IQ score. *See Kennedy v. Heckler*, 739 F.2d 168, 171-72 (4th Cir. 1984).

[4]The ALJ discounted more recent low IQ scores, contending that Smith's low scores were low due to the influence of alcohol or were faked. The ALJ accepts the higher recent score, apparently without consideration of the earlier school scores.

The undersigned also recommends that the Court remand the case with instructions for the ALJ to determine whether Smith has met the second prong of section 12.05C. In addition to proving an I.Q. of 60 to 70, the claimant must also prove he has a physical or other mental impairment imposing "an additional and significant work-related limitation of function." The plaintiff argues that he meets this element because of the Fourth Circuit's holding in Branham v. Heckler, 775 F.2d 1271 (4th Cir. 1985). Smith cites Branham for the proposition that the second 12.05C element – significant work-related limitation of function – is met where a claimant cannot do his past relevant work. But the factual circumstance in Branham is a far cry from this case. In Branham, the claimant filed his application for benefits shortly after he jumped from a fork-lift and hurt his back. Branham was unable to work after this accident, and the court found the injuries sustained prevented him from doing his past relevant work. This case is much different. Here, Smith waited eighteen (18) years after the alleged incident that caused his injuries before filing for disability. During that period and until 1999, Smith worked at a variety of jobs, including as a dishwasher, construction laborer, office cleaner, salad preparer and vinyl packer. (R. 415-17) Because Smith worked for so many years following the accident to which he attributes his injuries, reliance on Branham is inappropriate.

Further, unlike in Branham, Smith's years of work after the accident, which he contends caused his "additional and significant work-related limitation of function," cuts against any finding of disability. Indeed, the analysis employed the ALJ that Smith could not do his past relevant work is both thin and inconsistent with the record evidence. Specifically, the ALJ found that Smith could not perform any of his past relevant work, reasoning as follows: "[a]t the hearing, the vocational expert classified the claimant's former jobs as unskilled and at the medium level of exertion. Since the claimant is restricted

to work at the light level of exertion, the undersigned finds that he cannot perform any past relevant work." (R. 29) But this finding misreads the VE's assessment of Smith's past relevant work. At the hearing , the VE testified that Smith's past relevant work included both medium and light work (as a salad preparer and vinyl packer). (R. 424) Thus, the ALJ misinterpreted the VE's testimony to be that all of Smith's past relevant work was at the medium exertion level. As such, this case must be remanded for a correct evaluation of Smith's past relevant work and for a determination whether Smith has "a physical or other mental impairment imposing an additional and significant work-related limitation of function" under 12.05C.

Indeed, the fact that Smith worked for so long after his accident suggests that his impairment does not meet the second prong of 12.05C. Where a claimant has been employed and suffers from the same symptoms and same complaints in that time period as when he claims disability, he cannot be found disabled absent a showing of significant deterioration See Craig v. Chater, 76 F.3d 585, 596 n.7 (4th Cir. 1996); Cauthen v. Finch, 426 F.2d 891, 892 (4th Cir. 1970). Thus, here, the test to determine whether Smith has "an additional and significant work-related limitation of function" is whether his condition has significantly deteriorated since he was last able to work. On this score, the ALJ did not identify any evidence showing that Smith's condition had significantly deteriorated, and this case should be remanded to the Commissioner for consideration and explanation of whether Smith's condition has significantly deteriorated since he last worked.

CONCLUSION

For the reasons outlined above, it is the recommendation of the undersigned that both Smith's and the Commissioner's motion for summary judgment be denied and that this case be reversed and

remanded for further administrative determination. It is recommended that this be a sentence four (4) remand under 42 U.S.C. §§405(g) and 1383(c)(3). The Clerk is directed immediately to transmit the record in this case to the Hon. Norman K. Moon, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court hereby is directed to send a certified copy of this Report and Recommendation to all counsel of record.

Enter this 8th day of April, 2005.

/s/ Michael F. Urbanski
United States Magistrate Judge